MOTION FILED
JAN 6 1992

No. 91-959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SHELL OIL COMPANY, INC.,
Petitioner,

v.

CRUZ PEDRAZA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIRST CIRCUIT COURT OF APPEALS

MOTION OF THE CHEMICAL MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 37.2 of the Rules of this Court, the Chemical Manufacturers Association (CMA) moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. *Amicus curiae* is a non-profit trade association whose member companies represent 90 percent of the productive capacity for basic industrial chemicals in the United States. CMA member companies are subject to federal and state occupational safety and health regulations which are potentially affected by the outcome of this case.

CMA requests leave to file the accompanying brief to inform the Court of the significance of the First Circuit Court of Appeals decision on the national occupational safety and health program. Counsel for the petitioner Shell Oil Company has consented to the filing of this brief. The consent of counsel for Respondents Cruz Pedraza, et al., was requested but refused. CMA therefore requests leave to file the accompanying brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Chemical Manufacturers Association (CMA) is a non-profit trade association whose member companies represent 90 percent of the production capacity for basic industrial chemicals in the United States. CMA member companies, including Shell Chemical Company, a division of the petitioner, are located throughout the United States, and are subject to federal and state occupational safety and health standards. The Association is filing this *amicus* brief because of its general interest in assuring uniform application of occupational safety and health regulations.

The decision of the First Circuit Court of Appeals in this case conflicts with the decisions of other Circuits in comparable cases, and creates the potential for confusion and conflicts in the

application of federal and state regulations for warnings of occupational exposures to chemicals. Granting the petition for certiorari will enable the Court to clarify the preemptive effect of federal occupational safety and health standards on state common law actions. The outcome of this case will have a direct impact on chemical manufacturers — indeed all businesses subject to the Occupational Safety and Health Act — throughout the United States. If the Court of Appeals decision stands, substantial new regulatory authority will effectively be vested in juries sitting in state common law actions. Congress did not intend to grant juries the authority to undermine the carefully designed regulatory scheme in the Occupational Safety and Health Act.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION AND SUMMARY

89 million American workers.
6 million business establishments.
A single, uniform system of preventive health and safety measures to protect workers throughout the Nation: the federal Occupational Safety and Health Act (OSHA or Act), 29 U.S.C. § 651-678 (1970), and State plans approved by the federal government.
The potential for the decision of a single jury to undermine that regulatory system and its goal of national uniformity.

The principal question presented in the petition is whether the federal statutory structure for occupational safety and health protection preempts state common law actions which impose requirements different from those imposed by federal standards — requirements that could not be imposed by state legislation or regulation without prior federal approval.

This case involves the interplay between a federal statute and a personal injury action. The plaintiff alleged an injury as the result of exposure to a trace chemical, epichlorohydrin, for which OSHA has established a permissible exposure limit (PEL). The plaintiff was exposed to the material for a short period of time, approximately seven months out of 9 years of relevant employment. The

plaintiff made no allegation that either his employer, United Technologies Corporation, or the defendant, Shell Oil Company (the chemical supplier), violated any OSHA regulation governing exposure to epichlorohydrin. Shell warned of the presence of the chemical, the plaintiff's employer acknowledged receipt of the warning, and safety measures consistent with the OSHA requirements were implemented. The plaintiff seeks to hold Shell liable for failure to warn of the possible health effects of an exposure to epichlorohydrin at a level below the OSHA PEL.

OSHA, the federal statute involved in this case, has a comprehensive preemption provision. Section 18 of the Act preempts State regulation of occupational safety and health, except as part of a state plan approved by the federal Occupational Safety and Health Administration. 29 U.S.C. § 667. Section 4(b)(4) of the Act, however, preserves state remedies under workers' compensation and common law. *Id.*, § 653(b)(4). This case raises the important question of how these apparently inconsistent provisions apply to state tort actions which have the effect of imposing duties beyond those required by the federal (or approved state plan) occupational safety and health standards. The petition for certiorari should be granted in order to permit the Court to clarify the preemptive effect of OSHA on state common law actions.

A. Structure of the Occupational Safety and Health Act.

Since its enactment in 1970, OSHA and its far-reaching regulatory scheme have combined to create the single most important system for assuring worker protection in the United States. The Act cuts deeply and widely into the very core of American commerce. Congress found that occupational injuries and illnesses have a definite effect on interstate commerce, and that the only effective response to these problems is national in scope, and uniform in character. *See* OSHA § 2(a),(b), 29 U.S.C. § 651(a),(b); **S.Rept. No.** 1282, 91st Cong., 2d Sess., 2-4 (1970). The approach adopted under OSHA balances the needs of interstate commerce through an intricate, carefully crafted system of regulatory procedures, substantive rights and obligations. Nearly

two years of drafting, re-drafting, debate and compromise preceded enactment of OSHA; the very structure of the Act exhibits careful Congressional reflection.

The system of preventive health and safety measures Congress adopted in OSHA are exceptional because of their broad reach and careful articulation. The Act imposes a substantive duty on employers to furnish a workplace free from "recognized hazards" that cause, or are likely to cause, death or serious injury. OSHA § 5(a)(1), 29 U.S.C. §654(a)(1). Employers have an obligation to inform workers about known hazards, and to communicate new information about existing workplace hazards as it is received. *Id.*, § 8(c)(3), 29 U.S.C. § 657(c)(3). OSHA is authorized to close businesses exposing workers to imminent dangers. *Id.*, § 13, 29 U.S.C. § 662. Employees have a right under OSHA to remove themselves from the workplace, free from threats of reprisal, in situations which threaten serious physical harm. *Id.*, §11, 29 U.S.C. § 660(c); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 100 S.Ct. 883, 663 L.Ed.2d 154 (1980). In addition to its other powers, OSHA is authorized to issue emergency, temporary standards to address critical occupational safety and health matters. OSHA § 6(c), 29 U.S.C. § 655(c).

Congress made procedural innovations as well. The Act contains "hybrid" rulemaking provisions, which assure that sound science and relevant economic considerations underlie regulatory decisions. Appropriate to a statute affecting interstate commerce, health and safety standards developed by OSHA are required to reflect not only the effects of the exposure or activity, but also the costs and feasibility of controls to prevent the illness or injury. *See e.g., American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 508-513, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981). As a result, OSHA standards "reflect both the technical and policy expertise of the Agency". B. W. Mintz, *OSHA History, Law and Policy* 37-38 (1984).

The role of the states in regulating occupational safety and health is carefully limited by the Act. State standards governing matters for which a federal standard is in effect are expressly

preempted, and a state may "reclaim" regulatory authority only by adopting a detailed state plan approved by the federal agency. OSHA § 18, 29 U.S.C. § 667. State regulations more stringent than federal standards are permitted only with OSHA's approval. *Id.*, § 18(c), 29 U.S.C. § 667(c).

The pervasiveness of the OSHA regulatory system is readily apparent throughout the industries that manufacture, use, store and dispose of chemical products. The Z tables, 29 C.F.R. § 1910.1000, provide specific exposure limits for chemical products. Engineering controls are preferred over personal protective devices. *Id.*, § 1910.1000, Table Z-1-A (e); § 1910.134(a). Chemical process safety regulations address process safety requirements throughout the chemical manufacturing industry. 55 Fed.Reg. 29150 (July 17, 1990)(to be codified at 29 C.F.R. pt. 1910).

The prime example of OSHA's pervasive reach into the workplace is the Hazard Communication Standard (HCS), 29 C.F.R. § 1910.1200. The HCS governs the evaluations of hazards in the workplace, requires warnings to employees when they are or may be exposed to hazards, and mandates training programs and hazard-specific information. The HCS is the federal standard which delineates a supplier's duty to warn of chemical hazards. Taken as a whole, the OSHA regulatory regime provides far more uniform and comprehensive worker protection than any state regulatory system, or jury decision, could possibly achieve.

B. Summary of Reasons for Granting the Petition for Certiorari

The decision and reasoning of the First Circuit Court of Appeals are directly inconsistent with those adopted by other Courts of Appeals deciding similar issues. In cases involving federal statutes similar to OSHA, other Circuit Courts of Appeals have found preemption of state tort actions. They have limited the reach of savings clauses similar to OSHA § 4(b)(4) to those common law actions that do not seek to impose duties different from those imposed by federal standards. Certiorari should be granted to permit this Court to resolve this conflict.

The issue central to this case, the preemptive effect of OSHA on state standards, is an important question of federal law. Just last month, after the submission of Shell's petition, this Court granted certiorari in *Gade v. National Solid Wastes Management Association*, No. 90-1676 (Dec. 16, 1991). *Gade* raises the issue of the preemptive effect of OSHA standards on state "dual-purpose" regulations that allegedly "supplement" the federal regulatory scheme. The question of OSHA's preemptive effect on tort law decisions, even when supplemental to the federal regulatory scheme, is equally important. The federal policies of uniformity and consistency of regulation that underlie the *Gade* case are equally applicable here.

II. THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS OF APPEAL.

The doctrine of federal preemption of state activities, including state common law actions, has received considerable judicial attention from this Court. It is a firmly entrenched principle that state tort judgments have a regulatory effect and are therefore as subject to federal preemption as any other form of state regulatory activity. *See International Paper Co. v. Oullette*, 479 U.S. 481, 494-97 (1987); *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282, 286 (1986); *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959). Courts of Appeal in most circuits have taken this 30-year old principle seriously, and have held federal statutes and regulations to preempt state tort actions even where the federal statute in question contains a broad savings clause for state tort actions. Those courts have correctly reasoned that even a general savings clause cannot be construed to permit *all* tort actions, particularly those that would effectively impose requirements beyond those specifically prescribed by federal law.

The court below employed no such careful analysis, but simply and superficially read the OSHA savings clause to allow any and all tort actions, even where, as here, the actions seek to impose requirements in addition to carefully considered federal standards. The Court should grant certiorari to provide guidance to the

lower courts on the standards to apply in balancing the requirement for some degree of preemption with the need to give meaning to a statutory savings clause.

Taylor v. General Motors Corp., 875 F.2d 816, 822-827 (11th Cir. 1989), provides an example of the proper balance — a balance starkly at odds with that of the court below. *Taylor* involved a plaintiff's attempt to hold an auto manufacturer liable for injuries allegedly caused by the manufacturer's failure to include an airbag in a car. Although the manufacturer had complied with the Motor Vehicle Safety Act (MVSA), which provided the option of including airbags or other restraints, the plaintiff relied on an explicit savings clause in the MVSA. On its face, the MVSA savings clause appeared to preserve common law tort actions concerning the subject matter of the statute, regardless of the manufacturer's compliance with the law.

Notwithstanding the broad savings clause, however, the Eleventh Circuit held that the MVSA and its detailed regulations did in fact preempt the plaintiff's attempt to hold the manufacturers to a standard different than that set down under the statute. The *Taylor* court acknowledged that the savings clause should be given substantial effect, but without ignoring the necessary, preemptive effect of the specified federal standards. Only specified types of tort actions that did not implicate the federal standards could be allowed. The Tenth Circuit has reached this same conclusion as to claims for failure to install airbags. *See Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989). The holdings in *Taylor* and *Kitts* are in conflict with the holding of the court below.[1]

The Third Circuit, in like manner, looks to the purposes of the federal statute, and evaluates the effects of state common law on those purposes. Thus, where a tort claim had the effect of "tipping the Act's balance of purposes," by requiring conduct different than that required by the Federal Cigarette Labeling and Advertising

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[1] Ironically, the First Circuit itself has reach the same conclusion as *Taylor* and *Kitts* in an airbag case. *See Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). Inexplicably, the court below failed to discuss or even cite *Wood*.

Act, the claim was preempted. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), *after trial on remand*, 893 F.2d 541 (1990), *cert. granted* 111 S.Ct. 1386 (1991), *argued*, 60 U.S.L.W. 3278 (Oct. 8, 1991), *restored to calendar for reargument*, Oct. 21, 1991.[2] *See also Mowery v. Mercury Marine*, 773 F.Supp. 1012 (N.D.Ohio 1991) (product liability claim preempted by Federal Boat Safety Act); *MacMillan v. Redman Homes, Inc.* __ Tex. App. __, 1991 Tex.App. LEXIS 2846 (Sept. 11, 1991)(National Manufactured Housing Construction and Safety Standards Act preempts strict product liability and negligence claims). Similarly, the Eleventh Circuit has found that a complaint for inadequate warnings was preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, which governs the manner in which states may require pesticide labels. *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3825 (May 29, 1991)(No. 90-1837).

The OSHA Hazard Communication Standard establishes an employer/supplier's duty to warn. OSHA § 6(b), 29 U.S.C. § 655(b); 29 C.F.R. § 1910.1200. That standard represents an intricate federal balancing of the interests of employers and employees, health protection and economics, and even the competing interests of federal and state regulators.

As the First Circuit noted in *Palmer v. Liggett Group, Inc.* 825 F.2d 620 (1st Cir. 1987), state common law claims are preempted when they interfere with a carefully wrought federal regulatory scheme:

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[2] The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331-1340 (1981) contains an express preemption provision (§ 1334(b)), but no savings provision similar to that contained in OSHA § 4(b). The lack of a savings clause is not fatal to the analysis suggested here. Indeed, in the Labeling Act, Congress expressly balanced human health and commercial interests. See 15 U.S.C. § 1331 (purposes to adequately inform the public and protect commerce and the national economy to the maximum extent consistent with that policy). Although OSHA does not contain a similar, express balancing of interests, the standards-setting process and the federal government's implementation of the Act reflect just such a balancing of interests. See OSHA § 6(b)(5). OSHA's unique approach to balancing national interests is no less effective in preempting state common law tort claims than that adopted in the Labeling Act.

> It is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state... To permit the interposition of state common law actions into a well-defined area of federal regulation would abrogate utterly the established scheme of health protection as tempered by trade protection. *Id* at 626.

Plaintiff's challenge here is to the propriety of Shell's warnings, regardless of compliance with a carefully considered federal standard. The OSHA savings clause should not, and cannot reasonably, be read to save common law claims that render such federal standards so plainly irrelevant.

OSHA Section 4(b) can be given a logical, meaningful construction without undermining Section 18 and the necessary preemptive effect of federal standards. The savings clause clearly preserves tort actions where no federal OSHA standard exists. And it can be construed to allow tort actions even where there is a federal standard, so long as the tort action is not premised on a duty to warn, or some other duty, that would require conduct different from that required by OSHA standards. In other words, OSHA does not deny plaintiffs a right to bring a lawsuit and seek compensation; it simply denies the right to allege a theory of liability already covered by a federal standard. The First Circuit went much further, construing § 4(b)(4) as preserving *all* tort actions, even those which establish warning requirements that could not be imposed by the state through regulation under Section 18.

The First Circuit decision is in direct contrast to the decisions of other courts which have weighed the purposes and interests of the federal regulatory system and the common law. The petition for certiorari should therefore be granted.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT ISSUE OF THE EXTENT TO WHICH STATE TORT ACTIONS ARE PREEMPTED BY OSHA.

The number of cases recently decided on preemption grounds is testimony to the fact that federal statutory enactments do not always draw a bright line around the degree of exclusivity over state law. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. __, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *English v. General Electric Co.*, 495 U.S. at __, 110 S.Ct. at 2275.; *International Paper Co. v. Oullette*, 479 U.S. at 496. When a federal statute does not directly address the extent to which state regulatory activity is excluded, an implied preemption analysis must be made. *Wood v. General Motors Corp.*, 865 F.2d at 407. When the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," the federal law preempts the state. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 1151, 110 L.Ed.2d 65 (1988). In determining preemption, one must also look to potential interference "with the methods by which the federal statute was designed" to achieve its purposes. *International Paper Co. v. Oullette*, 479 U.S. at 496, 107 S.Ct. at 813.

An analysis of the preemptive effect on state common law looks not only to the specific provisions of the federal law, but also to the structure and operation of the statute in practice. Prior decisions of this Court have focused on a number of factors:

1) the plain language of the statute;
2) the policies and purposes served by the federal statute;
3) Congress' chosen regulatory method;
4) the level of oversight exercised by the federal government over state law; and
5) the degree to which states are permitted to diverge from the federally-mandated regulatory method;

Each of these factors bears on the question of whether Congress impliedly preempted state common law tort claims by

fashioning a regulatory structure so pervasive as to preclude that particular exercise of power.

A. The Plain Language of the Act Supports a Conclusion of Preemption.

Congress made clear that in the field of occupational safety and health, federal standards are supreme. OSHA § 18(a); 29 U.S.C. § 667(a). Section 18(a) provides that State courts and agencies may assert jurisdiction over occupational safety and health issues for which no federal standard is in effect. *Id.* As the remainder of Section 18 makes clear, states can only exercise jurisdiction over occupational safety and health issues for which there are federal standards, through a plan submitted and approved by OSHA. Section 18(a) contains no exceptions; it is absolute in its prohibition of state jurisdiction over matters addressed in federal standards.

A federal standard for epichlorohydrin is in effect. 29 C.F.R. 1910.1000, Table Z-1-A. OSHA § 6(b)(5) mandates that the standard be set at a level where "no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standards *for the period of his working life.*" 29 U.S.C. § 655(b)(5)(emphasis added). In this case the exposure to the epichlorohydrin was for a period considerably shorter than the plaintiff's working life. Notably, there is no allegation that the OSHA standard for epicholorhydrin was improperly promulgated. *Cf. Secretary of Labor v. Smith Steel Casting Co.*, 15 OSHC (BNA) 1001 (Review Commission)(April 24, 1991)(discussing adoption of 29 C.F.R. § 1910.1000, the air contaminants standard). Nor is there any allegation that Shell failed to comply with the hazard communication standard in warnings sent to plaintiff's employer.

A state regulation governing exposures to epichlorohydrin would be expressly preempted by the Act unless it was approved by OSHA as part of a state plan. Decisions in state tort actions that establish duties beyond those required by OSHA standards have

an effect similar to a prohibited state regulation. *See San Diego Building Trades Council v. Garmon*, 359 U.S. at 247; *Palmer v. Liggett Group, Inc.*, 825 F.2d at 626. The First Circuit decision therefore effectively validates state standards that would otherwise be prohibited by OSHA.

OSHA's general savings clause, OSHA § 4(b)(4), 29 U.S.C. § 653(b)(4), provides:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers or employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

The First Circuit decision, however, would not only "save" common law tort actions from OSHA preemption. The court's decision would also validate any state occupational safety and health law, even in the presence of a federal standard, as the savings clause provides little guidance on what is "*any* law with respect to injuries, diseases or death of employees . . ." It is a curious interpretation of OSHA that would permit States to fashion safety and health standards even in the face of the express preemption provision of § 18(a). As discussed earlier, the OSHA savings clause can be given substantial effect without according it the absurdly broad reach given it by the court below.

B. The Entire Federal OSHA Regulatory Scheme is Undermined by the Decision of the First Circuit.

1. Obstacle to Achieving Uniformity and Balance in Occupational Safety and Health.

The Court has noted that interference with Congress' statutory approach is not shown simply by the fact that both a federal regulation and a state tort decision have the same ultimate goal. *International Paper Co. v. Ouellette*, 479 U.S. at 481. The state law, whether manifested as direct regulation or a jury decision, must

create an obstacle to the achievement of that goal through Congress' chosen method, or it must create a conflict with the regulatory scheme. *Id. See also Taylor v. General Motors Corp.*, 875 F.2d at 823.

As noted above, Congress had a clear goal of uniformity in enacting a national occupational safety and health regime. The large number of covered workplaces, and the diverse nature of state controls (if any), mandated a federal approach. Indeed, state worker protection programs were thought to have such "significant variability in results," that an extensive federal regulatory role was required. *Hearings on S. 2864 Before Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 2d Sess. 72 (1968)(Statement of W. Wirtz). *See also id.* at 485 (Statement of C.M. Fair, Dep't of Legislation, AFL-CIO). It is also clear that much more than national uniformity was behind Congress' chosen regulatory structure.

OSHA strikes a careful balance between the potentially competing interests of employees and employers in the workplace. Standards must reflect not only a preventive approach to a health or safety problem, but must also take the feasibility and cost of potential controls into account. Commerce and competitiveness policies were also reflected in the Act's treatment of state regulation. A national occupational safety and health policy minimizes the unfairness of requiring "compliance by one manufacturer (with a state law) while his competitors, engaging in similar practices, remain free" to apply another standard. *See Weinberger v. Bentex Pharmaceuticals*, 412 U.S. 645, 653, 93 S.Ct. 2488, (1973). The First Circuit decision would create just such unfairness, as cost and feasibility considerations which would otherwise be included in a state regulation will certainly not be considered by a jury in a personal injury action.

2. Conflict with Substantive and Procedural Aspects of the Federal Regulatory Scheme.

A particularly disturbing aspect of the First Circuit decision is the potential for interstate conflict in the substantive rights, duties

and obligations applicable in different states. It is entirely foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct. Worker protection plans, and even preventive engineering measures, might have to be tailored to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement. *See Macmillan v. Redman Homes, Inc.*, __ Tex.App. ___, 1991 Tex.App. LEXIS 2846 (Sept. 11, 1991), *citing Ingersoll-Rand Co. v. McClendon*, 498 U.S. __, 111 S.Ct. 478, 484 (1990).

OSHA imposes an exhaustive procedural requirement for the adoption of federal health and safety standards that take into account risk and scientific information. The process used in setting the standard for epichlorohydrin is typical. *See Brief for Pet. Shell Oil Company* App. 209-216. The assessment and management of risks in the workplace is a difficult task. Sound scientific principles must be applied. Chemical structures, physical effects, the likely onset of acute or chronic effects, and the interpretation of toxicological and epidemiologic data all require proven scientific knowledge. *See Public Citizen Health Advisory Group v. Tyson*, 796 F.2d 1479, 1496 (D.C.Cir. 1986)(legal requirements and scientific bases for standards). The entire effort is designed to avoid the imposition of arbitrary regulatory controls, and to prevent the dilution of OSHA's comprehensive worker protections through warnings of negligible risks.

Compared to the scientific expertise applied in a toxicological or epidemiological study, a jury's findings could hardly rise to the level of even a theoretical speculation. Certainly a jury award is not likely to be made on the basis of cost and feasibility concerns, otherwise required under OSHA. The First Circuit decision would equate a jury's findings with those of scientifically trained experts. The entire "peer review" process inherent in OSHA would be jettisoned in favor of a standard set, however arbitrarily, by a jury. Clearly, a state common law action would thus stand "as an obstacle" to Congress' chosen method.

3. Interference with Federal Oversight of State Regulation.

OSHA permits states to reclaim their authority over occupational safety and health programs in specified instances, subject to federal approval. Under section 18(b), a state plan for occupational safety and health regulation can be approved by the federal government, provided it meets the criteria set forth in section 18(c). OSHA § 18(b),(c), 29 U.S.C. § 667(b),(c). Federal approvals of state plans are codified at 29 C.F.R. §§ 1952.100-.384 (1990).

Typically, the federal approvals describe the state plan, outline the level of federal enforcement to be applied, and identify legislative and administrative developmental steps required to make the state plan "at least as effective" as the federal program. 29 U.S.C. § 667 (c)(2). Even after the state plan is approved, however, the federal government continues to exercise concurrent jurisdiction for a three year period. *Id.* at § 667 (e),(f). Whenever a state plan fails to "comply substantially" with the federal standard, approval is withdrawn and federal enforcement authority applied. *Id.*, §18(f). "The state plan concept set forth in the Act is, in essence, a scheme of administratively controlled preemption." S. Bokat & H. Thompson, *Occupational Safety and Health Law* 681 (1988).

The degree of federal oversight of state programs is additional evidence that state common law actions are preempted by OSHA.[3] It is highly unlikely that Congress would have looked to state common law tort decisions as a means of efficiently correcting safety and health standards to reflect new technology or new

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[3] An excellent example of the restriction on state initiatives is OSHA's "product standard clause." OSHA § 18(b), 29 U.S.C. § 667(b). A standard different from the federal standard may be approved as part of a state plan if it is "compelled by local conditions" and presents "no undue burden on interstate commerce." *Id.* If the proposed state standard relates to an OSHA-regulated health or safety issue, the state must first seek federal approval. *Id.*

Under the First Circuit decision, however, there would be no requirement to show that the lower effective standard adopted by a jury is compelled by the "local conditions" other than those raised by individual plaintiffs. It is highly

hazard information. The First Circuit decision would permit state common law to function as an unprecedented supplement to — indeed substitute for — the federal regulatory regime.

As this Court aptly stated in *International Paper Co. v. Ouellette*, in analyzing a similar savings clause:

> We do not believe Congress intended to undermine this carefully drawn statute through a general savings clause... It would be extraordinary for Congress, after devising an elaborate... system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure. 479 U.S. at 494, 497.

A jury sitting in a state tort action could, in effect, amend the "state plan" by imposing a lower effective health or safety standard. Employers and suppliers would ignore that new "standard" at their peril. The jury decision would have the same practical effect of a formal amendment to the state plan, yet would be achieved in a manner wholly inconsistent with the method adopted by Congress.

(Continued)
likely that a common law decision will burden interstate commerce. A jury determination could require new warnings and labels in facilities located within a state. In addition, the decision will require frequent modifications in product labels, material safety data sheets, or other warning programs now used to communicate hazards. Companies with multistate operations may have to develop special labels or warnings designed to cope with the new "Pedraza" standard. This is exactly the type of extraterritorial effect that forces the conclusion that the decision imposes an undue burden on interstate commerce. If adopted by a state regulatory agency, a proposed state plan with these effects would surely be rejected by OSHA. To permit a jury to do what a state agency cannot further undermines the operation of the federal OSHA program.

CONCLUSION

For the reasons stated above, Shell Oil Company's Petition for a Writ of Certiorari should be granted. If certiorari is granted, the Court may wish to consider this case in conjunction with its consideration of Gade, No. 90-1676, as both cases involve the preemptive effect of OSHA standards on state law.

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